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No. 799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1959

DALTON STOCKER, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

REFERENCE TO OPINION DELIVERED IN COURT BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals is number 12715, and at the time of this writing is as yet unreported. Said opinion is appended hereto as provided by rule.

II.

JURISDICTIONAL STATEMENT

A. The decision of the Court of Appeals as to entrapment is in conflict with the applicable decisions of this Court on the same matter, in the case of (*Sherman v. U.S.*) reported in 356 U.S. 369, and in the case of (*Sorrells v. U.S.*) reported in 287 U.S. 435.

The decision of the Court of Appeals as to the admission of evidence of other crimes and offenses is in conflict with the applicable decision of this Court in (*Sherman v. U.S.*) 356 U.S. 369, and is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of (*Sang Soon Sur v. U.S.*) reported in 167 F. 2d 431, and the decision of the Court of Appeals for the District of Columbia Circuit in the case of (*Harper v. U.S.*) reported in 239 F. 2d 945.

The decision of the Court of Appeals in sanctioning the admission into evidence in the government's case in chief evidence of other crimes and offenses for which the defendant had never been charged, prosecuted or convicted, in an attempt to justify to the jury the government's solicitation of the defendant to commit the offenses for which he was on trial, stripped the defendant of the presumption of innocence to which he was entitled and sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

B. The Court of Appeals for the 7th Circuit upheld defendant's conviction in a decision rendered and filed on the 13th day of January, 1960. Defendant's petition for rehearing was denied on the 16th day of February, the

mandate was stayed for a period of thirty (30) days to allow the defendant time to petition this Court for a Writ of Certiorari.

C. The Statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

III.

QUESTIONS PRESENTED FOR REVIEW

A. Entrapment.

Whether or not the Federal Government may prosecute an individual for violations of the Migratory Bird Treaty Act when a Federal Officer and Agent sought out an individual not then engaged in the unlawful sale or possession of wild ducks, and by solicitation and deceitful persuasion lured said individual into making contacts for the Officer and Agent and from which said contacts the Agent made purchases of wild ducks?

B. Evidence of other crimes and offenses.

Whether or not the Government may in its case in chief, where the defendant has never taken the stand, justify to the jury its solicitation and inducement of the defendant to violate the law, by introducing in its case in chief evidence, composed of a narrative statement by the Federal Officer of conversations with the defendant, of other crimes and offenses for which the defendant was never arrested, charged, tried or convicted, such evidence being elicited by the government prosecutor from the Federal Officer?

IV.

STATUTORY VIOLATION CHARGED

Defendant was convicted of twelve violations of the Migratory Bird Treaty Act, Title 16 U.S.C.A. Sec. 703, which reads as follows:

> "703. Taking, killing or possessing migratory birds unlawful.
>
> Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. July 3, 1918, c. 128, 2, 40 Stat. 755; June 20, 1936, c. 634, 3, 49 Stat. 1556."

V.
STATEMENT OF CASE

Defendant, DALTON STOCKER, was charged by way of four informations with violations of the Migratory Bird Treaty Act for possession and sale of wild ducks. Title 16, United States Code Section 703, in the United States District Court for the Southern District of Illinois, Southern Division, for various offenses alleged to have occurred in the jurisdiction of the above mentioned District Court.

These four informations charged him alone in one information and jointly with another in each of the other informations. Defendant was tried alone on these four informations consolidated for trial and was convicted by a jury of eleven counts contained in these informations.

The government's chief witness was Anthony Stefano, an undercover agent for the Department of Interior, Fish and Wildlife Service. For the purpose of his activities, Mr. Stefano assumed the name of Mark DiMarco and posed as a factory representative of the Louver Manufacturing Company.

All evidence relating to possession and sale by the defendant came from this government officer. At the trial, defendant did not take the stand in his own behalf.

Defendant, as grounds for this petition, states that the government's own evidence shows entrapment as a matter of law, and further that the government introduced hearsay evidence of supposed crimes and offenses in its case in chief solely for the purpose of creating prejudice against him by the jury.

In calling the Court's attention to the testimony on these points we will refer only to the government's brief and appendix printed for the use of the Lower Court.

However, it is suggested that the Court, by considering both briefs and abstracts, will be better able to see the vicious manner in which this trial was conducted, and will be better able to see the dangers to our form of government if administrative agencies are left uncontrolled in investigations by the agency.

As to the matter of entrapment, the following evidence is called to the Court's attention.

THE FIRST CONTACT WITH THE DEFENDANT:

"Well, I was going through Beardstown [redacted] my way to Quincy; so I stopped, and telephoned [redacted] Stocker, and I told him I was a duck hunter. I was on my way hunting ducks and I asked him whether he took duck hunters out." (Government's Brief for Appellee and appendix, p. 29.)

THE SOLICITATION AT THE NEXT CONTACT:

"And, in the course of the conversation, I told him that I had hunted in Quincy and that I hadn't had any luck, and that I hated to go home without any ducks, and I asked him whether or not he had any ducks, and he said no, he didn't have any, and he said that he didn't know of anyone in Beardstown that had killed any ducks up to that date." (Brief for Appellee and appendix, p. 31.)

THE MONETARY INDUCEMENT:

"Well, I told him that, of course, I expected to pay for ducks, ..." (Brief for Appellee and appendix, p. 31.)

KNOWLEDGE THAT DEFENDANT NOT THEN ENGAGED IN CRIMINAL ACTIVITY CHARGED:

". . . Then he told me that he had done a lot of market hunting in the past, and that he always received a good price for his ducks. He said, however, he did this, he said, lately I have cut it out because I have a good job in Chicago, but he said, I'm going to go back into it because they are getting a pretty good

price for ducks around Beardstown." (Brief for Appellee and appendix, p. 32.)

FURTHER SOLICITATION:

"Well, I mentioned to Mr. Stocker, that I could use more than eight ducks." (Brief for Appellee and appendix, p. 39.)

On the matter of prejudicial evidence elicited from the government officer as to a narration of the conversations with the defendant, the Court's attention is called to the following:

UNRELATED CRIMES AND OFFENSES:

". . . Then he told me he had done a lot of market hunting in the past and that he always received a good price for his ducks." (Brief for Appellee and appendix, p. 32.)

"Well, he suggested that I get in touch with him. He again repeated that he had done a lot of market hunting and that he always got a good price and he got $2.00 when he hauled his ducks to Chicago, and he got $1.75 when he took his ducks to Springfield." (Brief for Appellee and appendix, p. 41.)

This evidence was reemphasized on the following page of the government's brief and appendix.

"I then asked Mr. Stocker whether or not the story that I had heard around Beardstown that at one time he had pulled a gun on two Federal Agents was true—.

Mr. Weiner: I'm going to object.

The Court: Well, if it was a conversation with him as part of this transaction, I think it is admissible. Overruled.

The Witness: And, he said, and he repeated that, or he said that at one time he had come in with a boat load of ducks, and two Federal Agents had jumped him as he was approaching the shore, that he raised his gun and said, 'Now, you git.' And, he said they got. And, then he took the ducks, put them in the trunk of his car, and went to Chicago and sold them." (Brief for Appellee and appendix, p. 83.)

VI.

ARGUMENT

Petitioner claims that as a matter of law, the government's own evidence shows entrapment. As it is in most cases where the government is the moving party in procuring the commission of the crimes with which the defendant is charged, the question of the propriety of showing propensity to commit a crime also becames an issue.

In the recent case of (*Sherman v. United States*) 356 U.S. 369, this Court held that on the government's own testimony there was entrapment as a matter of law. In the *Sherman* case, the majority of this Court refused to reassess the doctrine of entrapment as set forth in (*Sorrells v. United States*) 287 U.S. 435, although strongly urged to do so in a concurring minority opinion.

However, under the rulings in both of these cases, all the necessary elements to establish entrapment are here present. There can be no question that the criminal design in the present case originated with the officers of the government. The government's own testimony shows that the defendant was not engaged in the type of criminal activity with which he is charged when first contacted by the federal officers. The evidence conclusively shows that notwithstanding this knowledge, the government played on his weakness, and induced him to return to violations by the offer to pay high prices for the procurement of wild ducks. The type of activity in which the defendant was induced to engage is referred to as "market hunting." It is interesting to note that there is not one shred of evidence to show a market for wild ducks except that market created by the government itself.

If the government had not created a market, there would be no reason for the unlawful procurement. It is strongly urged that the present case shows entrapment more clearly than the *Sherman* case, as here the government official made the contacts and purchases himself and there can be no disclaimer of his activities.

The government in order to justify its activities sought to show to the jury what a scoundrel the defendant had been in the past. Such a showing of other unrelated offenses has been condemned in other circuits in (*Sang Soon Sur v. United States*) 167 F. 2d 431, and (*Harper v. United States*) 239 F. 2d 945.

In the present case, the government went even further than it did in the *Sherman* case. In the *Sherman* case the government introduced into evidence the record of two past convictions. This, it is conceded, is the usual method employed to impeach a defendant who takes the stand.

In the present case, the government did not introduce records of past convictions, but merely elicited from the government official conversations supposedly had with the defendant which tended to show past criminal activity, and which in no way tended to prove the present charges and which could only create prejudice against defendant in the minds of the jurors. This is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court said in the *Sherman* case, "The case at bar illustrates an evil the defense of entrapment is designed to overcome." However, to allow such a departure from the accepted manner of judicial proceedings as is present in the instant case, because the government instigated the crimes charged, creates an evil just as dangerous and

obnoxious to our form of government as the original solicitation by the government.

To sanction the procedure followed in the present case, would allow the government in all cases to proceed on the theory that the question of entrapment was involved: That being so, they would not then be limited to the usual methods of impeaching the character of the defendant. They could in all cases destroy the presumption of innocence in their case in chief. The presumption of innocence and the right of the defendant to be proven guilty of the precise crime with which he is charged are fundamental to our criminal jurisprudence. The courts should ever be alert to the dangers which exist when administrative agencies establish their own police departments, and are allowed to proceed on their own self-appointed standards.

This writer as a lawyer, as a citizen and as a veteran of World War II is aware of the many dangers to our form of government. The citizens of this country have placed their trust and confidence in this great tribunal to protect their individual rights from oppressive acts of the government. The principle involved here is important to all the people of this country and is not limited to this defendant.

Respectfully submitted,

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(APPENDIX)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

DALTON STOCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12715

SEPTEMBER TERM, 1959 JANUARY SESSION, 1960

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DALTON STOCKER, *Defendant-Appellant*

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

January 13, 1960

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*.

SCHNACKENBERG, *Circuit Judge*. Dalton Stocker, defendant, has appealed from his conviction on twelve counts contained in four informations, consolidated for trial which charged him, alone in one information, and jointly with another person in each of the other informations, with twelve violations of the Migratory Bird Treaty Act, 16 U.S.C.A. § 703, *et seq.*, which prohibits the possession or selling of any migratory bird, except as permitted by regulations adopted by the Secretary of the Interior.[1]

It is not controverted that the term migratory birds as used in the Act and regulations includes wild ducks and that the regulations provide for a possession limit of eight wild ducks and prohibit the sale of any wild ducks, except in situations not relevant here.

The charges upon which defendant was tried before a

[1] § 704.

jury, on his pleas of not guilty, involved possession and sale of wild ducks on six occasions.

There was evidence tending to prove the following facts, as summarized:

On October 30, 1956, Anthony M. Stefano, an undercover agent for the Department of the Interior, using the name of Mark DeMarco, visited defendant at his home at Beardstown, Illinois, and told him that he was a duck hunter, and engaged defendant to take him hunting for a fee of $10 on November 3, 1956. The agent appeared on that date, told defendant that he had hunted in Quincy without any luck and asked defendant whether he had any ducks, to which defendant responded in the negative and added that he did not know of anyone in Beardstown that had killed any ducks up to that date. When the agent said that he expected to pay for the ducks, defendant said "yes", but he did not have any on hand. He told the agent that he had done a lot of market hunting in the past, and that he had always received a good price for his ducks, and also that "lately I have cut it out because I have got a good job in Chicago, but . . . I'm going to go back in to it because they are getting a pretty good price for ducks around Beardstown."

---

[2] *Case No. 5778:* Counts One and Two charge the defendant and Michael Stell, the latter-named defendant not being on trial, with possession in excess of the limit, and sale of 75 wild ducks on December 30, 1956. Counts Three and Four charge possession in excess of the limit, and sale of 50 wild ducks on January 6, 1957.

Case No. 5776: Counts Two and Three charge the defendant and Perry Swan, the latter-named defendant not being on trial, with possession, in excess of the limit, and sale of 50 wild ducks on November 11, 1957. (Count One charging unlawful transportation of wild ducks was dismissed upon motion of the Government.)

Case No. 5793: Counts One and Two charge the defendant and Louis McCulley, the latter-named defendant not being on trial, with possession, in excess of the limit, and sale of 40 wild ducks on January 31, 1958. Counts Three and Five charge possession in excess of the limit, and sale of 95 wild ducks on February 24, 1958. (Count Four charging unlawful transportation was dismissed upon motion by the Government.)

Case No. 5800: Counts One and Two charge the defendant with possession in excess of the limit and the sale of 93 wild ducks on March 9, 1958.

Defendant told the agent that he would try to get some ducks for him from some contact later on, but said the price around Beardstown was $2 per duck.

On November 26, 1956, the agent went hunting with defendant, and upon their return the agent mentioned that he could use more ducks than they had shot that day, at which time defendant indicated there was fear, on the part of the "fellas around here", of the agent, because of the Minnesota license plates on his car. The defendant, after cautiously checking over what credentials and papers the agent had with him to make sure that he was not dealing with a federal agent, then asked the agent how many ducks he wanted and the price. The defendant then told him that he could get the agent some ducks and asked the agent's telephone number for this purpose. Again, the defendant told the agent about his market hunting and that he had always gotten a good price, being $2, when he hauled his ducks to Chicago, and $1.75 when he took them to Springfield. The defendant suggested that the agent contact him in about a month.

On December 30, 1956, the agent made the first purchase of ducks from the defendant. On this occasion the agent went to the defendant's home and the defendant told the agent he would call the party who had the ducks, which he did. During this telephone conversation, the defendant told the other party to bring the ducks over, but before concluding the conversation, the defendant told the agent who was standing close by the telephone, that this other party had 125 ducks and that he wanted $2 apiece for them. The agent stated that he had never paid that much before and refused to pay the price, and the deal would be off. The defendant then suggested that the other party on the telephone come over to his house and talk about it. The other person came over and was introduced as "Jack Hardy", an alias. Later evidence showed his name was Michael Stell. Defendant negotiated the price and the agent agreed to take only a part of the ducks at $1.75. While the agent was supposed to be waiting in his car in a nearby parking lot for delivery of the ducks, he walked down the alley in back of defend

ant's home and saw "Hardy" and the defendant carry two crates of ducks out the back door of the defendant's home. The agent then returned to the front door and was informed the ducks were now ready for him. The delivery was completed in the alley. Back inside the defendant's home the defendant figured the amount due on the transaction and $131.25 was paid by the agent. Defendant asked when the agent would be back and how many ducks he could use the next time. The defendant asked if he could use 50, but the agent hesitated again on the price. Defendant assured him that next time it would not cost more than $1.50.

1. We have set forth the facts rather fully in reference to these transactions which culminated on December 30, 1956, because of the defense of entrapment asserted by defendant. If there was no entrapment in connection with these transactions, our consideration of the evidence in reference to the subsequent transactions convinces us that there is no serious basis for a claim of entrapment as to them.

Defendant relies upon *United States* v. *Moses*, 220 F. 2d 166, where the court said, at 169:

> "* * * In cases like the present one the admitted fact that public officers proposed and solicited the criminal act is not even offset by an indication that the person solicited had recently engaged in similar criminality. While other facts may prevent such a situation from amounting to entrapment as a matter of law, cases like this will almost always present a substantial question of fact on the entrapment issue which must be considered and resolved like any other question of fact."

We have no quarrel with the law as announced in the *Moses* case. However, to the facts presented in the record before us, *United States* v. *Becker*, 62 F. 2d 1007, is more pertinent. The agent Stefano merely afforded defendant an opportunity and the defendant did what he could to embrace that opportunity. We cannot say that the facts show entrapment as a matter of law. The case presents

a substantial question of fact on the entrapment issue, which was properly considered and resolved by the jury like any other question of fact. The jury was fully instructed on entrapment and no objection was noted by defense counsel to the giving of the instructions on this subject. We hold no error was committed in the district court as to the defense of entrapment.

2. Defendant contends that the district court committed error in consolidating the four informations for trial, over his objection. Defendant was named in every count in the four informations. The consolidation facilitated the dispatch of the court's business (for instance, 403 wild ducks were admitted into evidence at one time), and no prejudice to defendant is shown. The consolidation called for an exercise of the court's discretion. We do not think that it abused its discretion in that regard.

3. Defendant contends that he was prejudiced by evidence which indicated that he had "done market hunting in the past". It was necessary for the government to go into his past in this respect in order to meet his defense of entrapment. He cannot now complain about this reference to his past.

4. We find no justification for defendant's attack upon the instructions which the court gave to the jury.

Specifically we note the defendant's objection to the following given instruction:

> One of the offenses charged in a number of the counts in the information on trial is for the unlawful possession of migratory birds. Now, the word "possession" includes actual possession, that is to say, the direct physical control over a thing at a given time or it may be constructive possession, that is to say one who knowingly has the power at a given time to exercise dominion or control over a thing is then in constructive possession of it. Possession may be sole or joint, that is if one person alone has actual or constructive possession of a thing such possession is sole. If two or more persons share actual or constructive possession of a thing their possession is

joint. As used in the counts of these informations, the words "unlawfully possess" means that the defendant on trial had either actual possession or constructive possession or joint possession. Proof of any one of these types of possession is all that is necessary, therefore, if you find from the evidence, beyond a reasonable doubt that the accused either alone or jointly with others, had actual or constructive possession of the migratory fowl described in any one count of the information, then you may find that such ducks were in the possession of the accused within the meaning of the word "possession" as used in the law and in these instructions.

He asserts that this instruction in effect amended the information, eliminating from consideration a portion of the charge, and also was prejudicial to the substantial rights of the defendant. We do not agree with his contention. In its essential respects this instruction was approved in *Johnson* v. *United States*, 270 F. 2d 721, 724.

For the reasons herein set forth, the judgment from which defendant has appealed is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, January 13, 1960

Hon. ELMER J. SCHNACKENBERG, Circuit Judge; Hon. LATHAM CASTLE, Circuit Judge; Hon. KENNETH P. GRUBB, District Judge

No. 12715

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DALTON STOCKER, Defendant-Appellant

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

(9660-2)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

DALTON STOCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 799

DALTON STOCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (P.R. 53-58)[1] is reported at 273 F. 2d 754.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1960 (P.R. 59). A petition for re-

[1] The petitioner has filed as the record the briefs and appendices filed by the government and petitioner in the court of appeals. The blue-covered government brief and appendix will be referred to as "R." Petitioner's appendix below, which was paginated separately from his brief but bound together with it, will be referred to as "P.R."

hearing was denied on February 16, 1960 (P.R. 60). The petition for a writ of certiorari was filed on March 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether entrapment was shown as a matter of law.

2. Whether statements made by petitioner to an agent concerning his previous conduct were admissible as going to the question of entrapment.

STATEMENT

The petitioner was convicted in the United States District Court for the Southern District of Illinois on twelve counts charging illegal possession and sale on six occasions of a total of 403 wild ducks in violation of the Migratory Bird Treaty Act [2] (P.R. 7-16; 41-44). He was sentenced to sixty days' confinement, followed by two years' probation, and to fines on each count ranging from $100 to $275 (P.R. 45-50).

---

[2] The Migratory Bird Treaty Act, as amended, 49 Stat. 1555 (16 U.S.C. 703-711), was passed to implement the conventions signed for the protection of migratory birds between the United States and Great Britain, 39 Stat. 1702, and the United States and the United Mexican States, 50 Stat. 1311. The Act provides that regulations to enforce the treaties are to be adopted by the Secretary of Interior and are effective when approved. Sections 2-4, 16 U.S.C. 703-705. The possession limit for the area involved here is eight wild ducks during the open season. See, *e.g.*, 50 C.F.R. (1958 Supp.) 6.51(d) and 22 Fed. Reg. 7049. Sale of wild ducks is prohibited, except in accord with regulations not here applicable. Section 2 of the Act, 16 U.S.C. 703; see 50 C.F.R. (1958 Supp.) 6.9-6.31.

The pertinent evidence may be summarized as follows:

Anthony M. Stefano, a criminal investigator for the Department of Interior, Fish and Wildlife Service, testified that he worked as an undercover agent in this case, using the name Mark DeMarco (P.R. 23). He previously had been supplied information as to illegal "market hunting activities" (*i.e.*, duck selling) by certain individuals (R. 28).

The agent met the petitioner at the latter's home in Beardstown on October 30, 1956, and inquired whether petitioner took people out hunting (R. 29). Petitioner told the agent that he charged ten dollars for this service, but that hunting was not yet too good. Petitioner suggested that the agent come back in two or three weeks (R. 30).

On November 3, 1956, the agent again met petitioner and told him that he had been hunting elsewhere but had no luck. He asked whether petitioner had any ducks. Petitioner said that he had none and "didn't know of anyone in Beardstown that had killed any ducks up to that date" (R. 31). When the agent told petitioner that he would pay for the ducks, petitioner replied that he did not have any on hand (R. 31-32). The agent testified (R. 32):

> * * * Then he told me that he had done a lot of market hunting in the past, and that he had always received a good price for his ducks. He said, however, he said this, he said lately I have cut it out because I have got a good job in Chicago, but he said, I'm going to go back into it

because they are getting a pretty good price for ducks around Beardstown.

Petitioner told the agent that he would try to get him some later at $2.00 per duck (R. 32).

On November 23, or 24, 1956, the agent and petitioner agreed to go duck hunting, which they did on November 26 (R. 32-33). Petitioner told the agent that the "fellows" were scared of him because the agent had Minnesota license plates on his car and a new federal agent had moved in from Minnesota. The agent explained that his company had transferred him to Illinois from Minnesota and he had not had an opportunity to change license plates (R. 34). They then went hunting. When they approached the blind, the petitioner called out that he was bringing a federal agent. The agent was not introduced to the others in the blind (R. 36). The agent's gun jammed and he quit shooting without getting any ducks, but the petitioner shot four (R. 37). The petitioner then picked up four more from a pile in the blind and they left (R. 38). The agent mentioned that he could use more than eight. Petitioner repeated that they were scared of him, so on request the agent showed petitioner some false credentials (R. 39; P.R. 23).

The petitioner asked how many ducks he wanted, and the agent said that it would depend on the price. The petitioner said that he had some "contacts" who would want $2.00 apiece and he would do this "as a favor" for the agent (R. 40). Petitioner volunteered that he had received $2.00 when he had hauled his ducks to Chicago and had received $1.75 when he sold

ducks in Springfield (R. 41-42). Petitioner suggested that the agent contact him in a month (R. 42).

On December 30, the agent met petitioner in the latter's home and petitioner made a telephone call to someone to bring the ducks over (R. 47, 49). When the agent complained about the $2.00 price, petitioner suggested that they talk it over (R. 49-50). A person called Jack Hardy arrived shortly thereafter (R. 50-51).[3] The agent offered to take the entire lot of 125 at $1.50 apiece but finally agreed to take 75 ducks at $1.75 each (R. 52) and to pick them up in a lot next to a grocery store (R. 53). The agent parked his car in the lot and then returned to observe petitioner and Hardy at petitioner's back entrance carrying two crates (R. 54, 58). Delivery was subsequently made in the alley behind petitioner's residence (R. 54-55). Petitioner asked the agent how many he wanted the next time and the agent said about fifty but inquired as to the price. Petitioner guaranteed that they would cost only $1.50 next time (R 57).

Petitioner later telephoned the agent to pick up the next group (R. 60). On January 6, 1957, when the agent arrived, petitioner asked if he could use an additional fifty. The agent refused, stating that he only had money for the agreed amount (R. 60-61). These ducks were then delivered (R. 61).

On November 12, 1957, the agent negotiated for fifty more ducks at $1.25 apiece (R. 63-67) and on

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[3] This person is subsequently identified as Michael Stell (R. 73).

January 31, 1958, for forty ducks (R. 68-72) which petitioner told him were part his. In discussing the previous sales, petitioner said that it was the first time he "ever sold ducks for any less than $1.75" (R. 73). The next sale, on February 24, was of 95 ducks, of which 65 came directly from the petitioner's deep freeze (R. 75-79). The final sale was on March 9, 1958, when petitioner sold the agent 93 ducks from his deep freeze and told how he and two others had killed 115 ducks on the previous November 26 (R. 80-82).

The agent testified that he then asked petitioner whether the story was true that he had pulled a gun on two federal agents. Petitioner's counsel stated "I'm going to object." The court held the evidence admissible as part of the transaction. The agent related that petitioner told him that he had raised his gun at two agents and said, "Now, you git," and that he had sold the ducks in Chicago (R. 83).

The petitioner did not take the stand but offered the rebutting evidence of two other persons who had participated in his activities (P.R. 29). The court submitted the case to the jury under a charge which included an instruction on the defense of entrapment (P.R. 38-39). The jury found petitioner guilty on all twelve counts (P.R. 41-44).

The court of appeals ruled that the facts did not show entrapment as a matter of law (P.R. 56) and that the issue was properly submitted to the jury under instructions to which no objection was made by petitioner's counsel. The court also held that evidence of petitioner's "market hunting in the past"

was admissible to meet the defense of entrapment (P.R. 57).

ARGUMENT

1. The petitioner contends that the evidence shows entrapment as a matter of law. The record, however, demonstrates that the government agent acted merely as a decoy to a person who had been and was in the business of illegally marketing wild ducks. The first time the sale of wild ducks was broached by the agent, petitioner did not refuse but merely stated that he was unable to supply ducks because there were not "any on hand" (R. 32). Petitioner then immediately admitted that he had sold ducks before and was "going to go back into it because they are getting a pretty good price * * *" (R. 32). The agent made no appeals to sympathy, mutual friends, nor any inducement of possible exorbitant gains. In fact, the government agent refused to deal at the high price suggested by petitioner, but repeatedly and successfully attempted to purchase the ducks at a lower price. The jury was, therefore, justified in finding that there was no entrapment. The most the government agent did was to "afford opportunities or facilities for the commission of the offense"; he clearly did not "implant in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States*, 287 U.S. 435, 441, 442; see *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386.

2. Petitioner complains of the introduction into evidence of statements made by him in the course of

his dealings with the government agent. These statements consisted of admissions of having done market hunting in the past (R. 32), of the price he had sold ducks for on the market (R. 41), of killing more than the limit (R. 67, 82), of planning to hunt in order to market the ducks (R. 74), and of previously threatening government agents with a gun (R. 83).

The short answer is, that except for the last item, no objection was made to this testimony, and on the last item, the only objection was an equivocal "I'm going to object" (see *supra*, p. 6). Thus, in effect, petitioner's counsel recognized that this testimony was a part of the whole transaction. *St. Clair* v. *United States*, 154 U.S. 134.

In any event, such matters were clearly admissible in view of the defense of entrapment. The petitioner "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, *supra*, 287 U.S. at 451; *Sherman* v. *United States*, *supra*, 356 U.S. at 373.[4]

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[4] Petitioner's suggestion (Pet. 9) of a conflict among the circuits is without merit and is, in fact, based upon decisions fully consistent with the holding of the court of appeals here. *Sang Soon Sur* v. *United States*, 167 F. 2d 431 (C.A. 9), held that convictions for possession of opium could not be admitted in an income tax evasion case, since the former were completely independent and unrelated crimes. And *Harper* v. *United States*, 239 F. 2d 945 (C.A. D.C.), recognized the admissibility of similar offenses as to the issue of intent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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